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13   **IN THE UNITED STATES DISTRICT COURT**

14   **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

15 IN RE: PORTFOLIO RECOVERY ASSOCIATES,)   Case No. 3:11-md-02295-JAH-BGS
16 LLC TELEPHONE CONSUMER PROTECTION)
   ACT LITIGATION   )   PLAINTIFFS' RENEWED
17   )   APPLICATION FOR LEAVE TO
)   CONDUCT DISCOVERY
18 This Document Relates to All Member)
   Cases   )
19   )
)   HON. JOHN A. HOUSTON
20

21   Plaintiffs with Member Cases in this MDL ("**Plaintiffs**") request leave of Court to

22 continue the discovery period and allow discovery from Portfolio Recovery Associates,

23 LLC. ("PRA").

24   Plaintiffs first filed this application on July 15, 2021. It was denied without

25 prejudice (Doc. 811) pending the ruling by the Honorable Bernard G. Skomal, United

26 States Magistrate Judge on PRA's motion to quash discovery sent to Avaya. Judge

27 Skomal denied PRA's motion to quash (Doc. 812) and is overseeing the discovery with

28 regard to Avaya. Thus, it is now appropriate to renew this motion with regard to PRA.

1   This Court approved an earlier request to reopen discovery in this case. (Doc.

2   802). Plaintiffs served PRA with a request for the production of source code. A copy of

3   the request and PRA's responses are attached as Exhibit 1.

4   PRA objects to the discovery sent to PRA as outside the scope of the Court's

5   previous Order, essentially objecting that the Court only allowed additional discovery

6   with regard to Avaya and not PRA. Because PRA objects to the discovery sent to it,

7   Plaintiffs file this Application specifically requesting approval to conduct discovery with

8   regard to PRA.

9   ### I.   Good Cause Exists to Allow Discovery From PRA

10   The issue in this MDL is whether PRA used an ATDS in calling the Plaintiffs.

11   The Supreme Court in *Facebook* held that "[t]o qualify as an 'automatic telephone

12   dialing system,' a device must have the capacity either to store a telephone number using

13   a random or sequential generator or to produce a telephone number using a random or

14   sequential number generator." The parties are now arguing about what qualifies as a

15   "device."

16   Plaintiffs contend, and have always contended that, the PRANet, the Avaya

17   software/dialer and the Asimut Technologies software combine to make an ATDS.

18   After Plaintiff's previous motion to reopen discovery was filed, Plaintiffs hired a

19   consulting expert who advised them on the ways PRA's dialing system may use a

20   random or sequential generator. The discovery Plaintiffs sent to PRA and Avaya

21   targeted those areas and ways.

22   Defendant is opposing the discovery sent to it and is attempting to separate the

23   components of its calling system and have the Court analyze them separately.[1]

24   **1. PRA has been on notice that Plaintiffs consider the PRA's dialing system to**
25   **consist of all of the components in its calling system.**

26   ---

[1] The Federal Communications Commission emphasized that it is the capability of the overall dialing
27   system that must be analyzed to determine if a particular dialing system is an ATDS and not just the
capabilities of the individual components of the dialing system. See, In re Rules and Regulations
28   Implementing the Telephone Consumer Protection Act of 1991 (2015 Declaratory Ruling), 30 FCC
Rcd. 7961, ¶ 24 (2015)

RENEWED APPLICATION FOR LEAVE TO CONDUCT DISCOVERY

3:11-MD-02295-JAH-BGS

PRA's ATDS is properly defined as all of the components in the "calling system." This is not a new position taken by the Plaintiff in the current case.

In Plaintiffs' motion for summary judgment, the Plaintiffs argued that all of the components constituted the calling system. (Doc No 674-1, pages 31-37) This position is not a surprise to PRA. To the contrary, in the diagram used in discovery in this MDL the entire calling system is outlined. The Avaya software is connected to Defendant's PRANet database and receives telephone numbers from that database. That connection is part of the calling system. It is this connection and data transfer about which Plaintiff seeks discovery from PRA.

2. The discovery in the *Bell* case included a request for production of source code from PRA.

As Judge Skomal noted in his order, the order on the record at the conclusion of this Court's hearing on the initial motion to reopen discovery noted that the discovery will be conducted alongside the discovery produced in the *Bell* case.[2] (Doc. 804 at 12-13.) In the *Bell* case discovery was sent to PRA for its source code. A copy of PRA's responses to that is attached as Exhibit 2. The same discovery that was sent in the *Bell* case to PRA was also sent in the current case.[3]

3. The source code from PRA is necessary to make a complete evaluation of PRA's dialing system.

The well-qualified consultant engaged by Plaintiffs explains why it is necessary to review PRA's source code to determine whether the dialing system, including the PRANet database, contains the necessary functions of an automatic telephone dialing system. Exhibit 3, Declaration of Hollaar, ¶¶ 10-11. Thus, the discovery from PRA is necessary and Plaintiffs have no other means to obtain the source code other than the discovery propounded on PRA.

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[2] *Bell v. Portfolio Recovery Associates, LLC,* Case No. 5:18-CV-00243-OLG (W.D. Tex. 2021)
[3] The discovery in Bell requested the same source code but for different dates.

RENEWED APPLICATION FOR LEAVE TO CONDUCT DISCOVERY
3:11-MD-02295-JAH-BGS

II.   Relief Requested

Plaintiffs request the following relief:

- An order allowing additional discovery from PRA, beginning with the written discovery attached as Exhibit 1 requiring PRA to produce certain source code;

- An order allowing Plaintiffs to depose a representative of PRA after PRA has responded to the written discovery;

- An order allowing the parties to retain additional expert witnesses, if necessary;

- An order allowing at least 120 days to complete discovery (PRA and Avaya); and

- Continued abatement of the motions for summary judgment with such motions to be renewed at an appropriate time.

Dated July 26, 2021   Law Office of Chris R. Miltenberger, PLLC

                                             By: s/ Chris R. Miltenberger
                                             Co-Lead Counsel for Plaintiffs with Member
                                             Cases

                                             Lester & Associates

                                             By: s/ Patric A. Lester
                                                    Patric A. Lester
                                                    pl@lesterlaw.com

                                             Co-Lead Counsel for Plaintiffs with Member
                                             Cases

1 Re: In Re Portfolio Recovery Associates, LLC, TCPA Litigation
   Case No. 3:11-md-02295-JAH-BGS
2 United States District Court, Southern District of California

3   **CERTIFICATE OF SERVICE**

4 I, the undersigned, declare as follows:

5 On the date below, I electronically filed with the Court through its CM/ECF program
   and served through the same program the following:
6
7   **PLAINTIFFS' RENEWED APPLICATION FOR LEAVE TO CONDUCT DISCOVERY**

8 on the interested parties in said case, and upon non-registered parties, as follows:

9 ☒ BY MAIL, by placing a copy thereof in a separate envelope for each addressee
   named below with the postage thereon fully prepaid, deposited each in the United States
10 mail at St. Louis, Missouri in accordance with our business' practice.

11

12 Craig Cunningham   Ross A. Miller
   5543 Edmondson Pike, Suite 248   P.O. Box 12433
13 Nashville, TN 37211   Richmond, VA 23241

14
   Jarrett R. Jenkins   Lee Arthur Momient
15 334 Locust Street, Apt-1   P.O. Box 608082
16 West Hempstead, NY 11552-3044   Chicago, IL 60660

17

18
   I declare under penalty of perjury under the laws of the State of California that the
19 foregoing is true and correct.

20 Dated July 26, 2021   Lester & Associates

21   By: _Mary Belford Smith_
22   Mary Belford Smith
                                             Paralegal for Patric A. Lester
23   Attorney for Plaintiffs with Member Cases

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